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No. 84-1859

In The

Supreme Court of the United States

October Term, 1984

STUART MARSH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF FLINT, a Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS, individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—AND APPENDIX—

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QUESTION PRESENTED

DID THE TRANSFER OF PETITIONER FROM A COUNSELING POSITION TO A CLASSROOM TEACHING POSITION WITHOUT LOSS OF PAY, BENEFITS AND SENIORITY, PURSUANT TO AFFIRMATIVE ACTION PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BOARD OF EDUCATION OF A PUBLIC SCHOOL SYSTEM AND THE TEACHER'S UNION, DEPRIVE PETITIONER OF EQUAL PROTECTION OF THE LAWS?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE:

A. Preliminary Matters 1

B. Background and Facts 2

REASONS FOR DENYING PETITION

I. THE CONTRACTUAL AFFIRMATIVE ACTION PLAN IS A CONSTITUTIONALLY PERMISSIBLE PLAN TO PROVIDE NECESSARY EDUCATIONAL SERVICES. 4

II. THE MARSH CASE IS NOT THE CASE TO TEST THE SIXTH CIRCUITS DECISION IN *BRATTON*. 9

CONCLUSION 10

APPENDIX 1a-25a

TABLE OF AUTHORITIES

Page

CASES:

Bratton v City of Detroit, 704 F2d 878 (6th Cir 1983) cert. denied, 104 S Ct 703 (1984), Reh'g denied, 104 S Ct 1431 (1984) 9

U.S. v School District of the City of Flint, et al., (Ed. Mich. 1980) Docket No. 80-40075 ..... 2 n.1

STATUTORY PROVISIONS:

Michigan Tenure of Teachers Act, MCL 38.71; MSA 15.1971 *et seq.* 8

OTHER AUTHORITIES:

In the Matter of Flint Community Schools, et al. HEW Docket No. S-115 (1977) 2 n.1

STATEMENT OF THE CASE

A. Preliminary Matters

Respondent, Board of Education of the City of Flint, is hereinafter "Board". The School District of the City of Flint is hereinafter "District".

Respondent, United Teachers of Flint (hereinafter UTF) is the collective bargaining agent for teachers employed by the Board. Petitioner, both as counselor and classroom teacher, is a member of the bargaining unit represented by the UTF.

"Teachers" is used in the collective bargaining agreement in the generic sense to describe all members of the unit,—classroom teachers, counselors and etc.

"Counselors", under Michigan law, must hold valid Michigan teaching certificates with counseling endorsements.

"Seniority" is accrued by all members of the UTF bargaining unit on a system-wide basis.

Contrary to statements on page 4 of the Petition, there were no "factual stipulations" in the District Court. The facts before the District Court when it issued its "Memorandum Opinion and Order" granting Respondents' motions for summary judgment were those recited in the Board's affidavit and Petitioner's affidavit in opposition to the motions for summary judgment. The Board's affidavit is included in the Appendix at pages 1a-14a. The

exhibits referred to in the Board's affidavit are not included because of their bulk.[1] The Petitioner's Affidavit is included in the Appendix at pages 16a-20a.

B. Background and Facts

The full text of the affirmative action provisions of the collective bargaining agreements that allegedly offend the Equal Protection Clause are printed in the Appendix at pages 10a, 11a.

Reduced to their essence, the challenged provisions permit the Board to ignore system-wide seniority in determining which counselors shall be laid off. The goal is a counseling staff including a percentage of minorities that exceed by 5% the ratio of minority teachers to the total teaching staff (including counselors) in the secondary school teacher labor pool in existence at the time of their layoff.

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1. Exhibit 7 is a 117 page Decision of the Administrative Law Judge issued in the Matter of Flint Community Schools Michigan and Michigan State Department of Education, Respondents (HEW Docket No. S-115) in which is recited a litany of the District's past discriminatory practices and the vestiges remaining which the ALJ used to justify termination of federal funding to the District. HEW referred the matter to the Justice Department. The Justice Department commenced action against the District in the United States District Court, Eastern District of Michigan charging violations of Title VI of the Civil Rights Act of 1964. The action was settled by Consent Judgment, without prejudice. The District still operates under the Consent Judgment entered by the Honorable Stewart A. Newblatt in the United States District Court for the Eastern District of Michigan, Southern Division—Flint (Docket No. 80-40075). (App. 12a)

The affirmative action provisions do not, however, apply to the filling of vacancies on the counseling staff. If there are vacancies or an increase in the number of counselor positions, laid off or transferred counselors are guaranteed the right to return to counseling on the basis of system-wide seniority (last out first back) for a period of three years.

The goal of the contractual affirmative action plan was and is to maintain a counseling staff having a sufficient number of black counselors to permit assignment of one black counselor to each of the District's 13 secondary schools.[2] (App. 9a, 13a) The rationale for assignment of one black counselor to each secondary school is discussed below.

By operation of the contractual affirmative action plan, Stuart Marsh was transferred from his counseling position to a classroom teaching position in the 1980-81 school year. Classroom teachers receive the same pay and benefits as counselors. Counselors and teachers accrue seniority on a system-wide basis.

In the 1981-82 school year Petitioner exercised his seniority to claim a counseling position. In the 1983-84 school year, again by operation of the contractual affirmative action provisions, he was transferred to a teaching position. He continued teaching during the 1983-84 school year.

He again claimed a vacant counseling position at the beginning of the 1984-85 school year. He continues as a counselor. It is highly unlikely Stuart Marsh will ever

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2. Counselors are assigned only to secondary schools.

again be transferred to a classroom teaching position. (Affidavit of Stuart Boze—App. 21a-25a)

———o———

REASONS FOR DENYING PETITION

The Contractual Affirmative Action Plan Is A Constitutionally Permissible Plan To Provide Necessary Educational Services

A. The Educational Purpose

The boundaries of the City of Flint, Michigan and the boundaries of the District are the same, with immaterial exceptions. The City is a General Motors Corporation plant city. The economic health of the City and the District fluctuates with the rise and fall of automobile production. The population of the City, and thus the student population of the District, have declined steadily for more than a decade because of white flight, highway construction, the automobile industry recession, automation and other urban ills. The minority population has become the majority. More than 60% of the District's students are black. Black students are enrolled in all of the District's 13 secondary schools. Several secondary schools are more than 90% black.

Because of declining enrollments, the teaching staff was reduced over a period of years. It became apparent to both the UTF and the Board, prior to the opening of negotiations for a new collective bargaining agreement in 1979, that further and deeper cuts would have to be made because of depressed conditions in the automobile industry. Because black counselors were the last hired,

they would be the first to go, making it impossible to provide one black counselor in some of the secondary schools.

Counselors in the Flint School System are not just academic advisors. They deal with a variety of the students' personal problems;—poverty, broken homes in which addiction, student pregnancies to name a few. To suggest that a black counselor is no more than a role model for black students is to ignore the realities in life in this predominantly black, urban, industrial city school district where high unemployment is sometimes the rule rather than the exception.

There are times when black students require the counseling of someone who can understand and help them deal with their special problems. Insuring that a black counselor is available serves a valid educational purpose.

B. HEW Administrative Proceedings

On March 22, 1976, HEW commenced compliance proceedings for the termination of federal financial assistance to the District charging the District denied black students equal educational services and opportunities in violation of Title VI of the Civil Rights Act of 1964. On October 6, 1977, following a lengthy hearing, the Administrative Law Judge assigned to conduct the proceedings issued his Decision in which he found the District guilty:

> "a. Respondent Flint historically engaged in conduct, continued after 1964 and continues at present to engage in conduct and vestiges of Respondent's pre-1964 conduct continued after 1964 and continues at present, to segregate black students into certain schools and maintain other schools as white in enrollment as long as possible, which may be more fully described as follows:
>
> (1) neighborhood school policies;
>
> (2) school site selection;

(3) changes in school attendance zone boundaries; and

(4) adjustment of school assignments inconsistent with school capacities.

b. Respondent Flint historically operated, continued after 1964 and continues to operate a school system identified by substantial segregation of race and color of students assigned.

c. Respondent Flint historically assigned, and continued after 1964 until January, 1977, to assign Black teachers and supervisors to schools which were identified by predominant enrollment of Black students.

d. Respondent Flint historically operated, continued after 1964 until 1977 to operate a school system identified by substantial segregation by race and color of teachers and supervisors assigned." (App. 6a, 7a)

The Administrative Law Judge established a plan which he said would bring the District into compliance with the requirements of Title VI and ordered their implementation.

"Although Respondent Flint achieved compliance with *Singleton* in 1977, the compliance is concluded to be as a result of this case. Accordingly, desegregation should require a commitment from Respondent Flint to maintain compliance with *Singleton* in the future.

Discrimination in employment of teachers has not been established. No remedy, thus, can be required on this allegation. As noted, since 1960 Respondent Flint appears to have engaged in an effective affirmative action plan in the employment of Black teachers. For the same reason, no remedy can be required for the alleged discrimination in promotions of blacks to supervisory teachers since 1964, and for the alleged discrimination in assignment of lower qualified teachers to predominantly Black schools." (App. 7a, 8a)

Both parties filed exceptions. No action was taken on the exceptions before the Justice Department commenced suit in the United States District Court for the Eastern District of Michigan which resulted in the Consent Judgment mentioned in footnote 1.

It does not matter that the Board of Education disagrees with the findings and conclusions of the Administrative Law Judge and that settlement of the long-standing dispute with OCR-HEW was reached without admissions of guilt. The findings were made by an Administrative Law Judge pursuant to the authority vested in him. The Board is not limited to the remedies prescribed by the Administrative Law Judge, or those in the Consent Judgment approved by the District Board, in its efforts to correct the intentional discrimination found.

C. The Contractual Affirmative Action Plan Was The Least Burdensome Plan That Could Have Been Adopted

Stuart Marsh lost no pay, benefits or seniority as a result of the implementation of the Plan. He declares he lost status when he was returned to the ranks of classroom teachers.

It is Stuart Marsh's perception that there are TEACHERS and there are teachers;—that counseling is a higher estate in the Order of Educators than classroom teaching. Thus, he declares, his transfer to teaching was, in fact, "a demotion". Moreover, Petitioner says, "Because Marsh is the wrong color, he has twice been forced to assume rigorous new duties at the twilight of his career . . ." (See Petition, note 2, p. 5)

No evidence was offered in the District Court to support these assertions. In fact, in his affidavit to the Dis-

trict Court in opposition to the motions for summary judgment, Marsh characterizes his change of duties as a "transfer." (App. 17a) The words "demoted", "demotion" and the like were used only in his briefs and oral arguments by his counsel to the Court. The District Court adopted and incorporated in its opinion Petitioner's unproven assertion that he had been "demoted".

Counselors are teachers with additional training in counseling. The Michigan Tenure of Teachers Act does not distinguish between teachers with different specialties. Special education teachers obtain tenure as "teachers", not as special education teachers. Counselors obtain tenure as "teachers", not as counselors. *MCL 38.71; MSA 15.1971 et seq.* The word "demote" is defined by the Tenure Act to mean "to reduce compensation or to transfer to a position carrying a lower salary." *MCL 38.74; MSA 15.1974.*

Stuart Marsh was deprived of nothing to which he was entitled. Stuart Marsh is a tenured teacher. He is not a tenured counselor. He was not deprived of a Constitutionally protected property interest when he was transferred to a classroom teaching position, and he makes no such claim.

No less burdensome plan than the contractual affirmative action plan agreed upon and implemented by the Board and the UTF could have been devised to insure that at least one black counselor was available to students in each secondary school of the District. Petitioner has suggested none.

II. The Marsh Case Is Not The Case To Test The Sixth Circuit's Decision in Bratton

Petitioner's counsel has seized on the Marsh case to test the validity of the two-tier test for determining whether a public employer's affirmative action plan passes Constitutional muster enunciated by the Sixth Circuit Court in *Bratton v City of Detroit,* 704 F2d 878 (6th Cir 1983) as modified on denial of reh'g en banc, 712 F2d 222 (6th Cir 1983), cert denied, 104 S Ct 703 (1984).

There is no need to apply *Bration* tests to determine the Constitutional validity of the contractual affirmative action plan implemented by the Board and the UTF.

The plan serves a valid educational purpose. The plan is an appropriate and Constitutional remedy for the intentional discrimination found by the Administrative Law Judge. Except for damage to Marsh's ego and his perception of his status among teachers, the only injury he has suffered is his overstated claims he was overworked as a classroom teacher. The Equal Protection Clause does not protect Mr. Marsh from injury to his ego, protect his perception of his place in society and among his fellow teachers, and, most certainly, the Equal Protection Clause does not grant immunity from hard work.

The Board/UTF contracual affirmative action plan is Constitutional with or without *Bratton's* tests.

———o———

CONCLUSION

For the reasons stated, and for the reasons stated in the UTF respondents' Brief in Opposition, with which the Board respondents concur, the Board respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: July 25, 1985

APPENDIX

TABLE OF CONTENTS

Page

A. Board's Affidavit In Support Of Motion For Summary Judgment

Marsh v. Board of Education
(E.D. Mich.) 1a

B. Petitioner's Affidavit In Opposition to Motion For Summary Judgment

Marsh v. Board of Education
(E.D. Mich.) 16a

C. Affidavit In Support Of Board's Motion To Dismiss

Marsh v. Board of Education
(Sixth Circuit) 21a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

Case No. 80-40349

STUART MARSH,

Plaintiff,

v.

BOARD OF EDUCATION OF CITY OF FLINT, et al,

Defendants.

---/

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AFFIDAVIT IN SUPPORT OF DEFENDANTS' (BOARD OF EDUCATION AND MACKSOOD) MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

At the Interim Pre-Trial Conference held January 5, 1983 the Court remarked that it is the Court's opinion that an affirmative action plan which establishes goals for the employment and assignment of minority teachers is

unconstitutional unless the plan is adopted and the goal established to remedy present or past discrimination against minorities.

The Court then stated that while the Court might infer impermissible discrimination against minorities in their employment and assignment to teaching positions in the School District from the data furnished by the Board in support of its motion, the Court did not believe the data were sufficient to warrant the dismissal of this action on motion.

The Court then ordered the parties to submit to the Court supplemental affidavits and briefs in support of or in opposition to the Board's Motion for Summary Judgment. Although the Board does not agree with the propositions stated by the Court, the Board nevertheless submits the affidavit contained herein in pursuance of the Court's order.

To adequately establish the basis for the Board's Motion, it is necessary to review history, to consider U.S. Department of Health, Education and Welfare charges that the Flint School District violated Title VI of the Civil Rights Act of 1964 — 42 USC 2000d et seq, the deferral of federal funds pending a hearing on the charges, the findings and decision of the Administrative Law Judge, the termination of federal funds and the disposition of the charges both by voluntary action on the part of the Board and as a result of settlement with the U.S. Department of Justice.

Thirteen years elapsed between the onset of HEW's investigation of the District on charges of Title VI violations and the ultimate settlement (if one can ever call

such matters settled) of the various issues with the Justice Department in 1981. The charges against the District were multiple, including charges of intentionally discriminatory employment practices, denial of equal educational opportunities and segregation of the student bodies and teaching staff of the schools of the District all based upon race. Given the period covered by HEW's investigation (the mid-30's to 1977 and thereafter until settlement with the Justice Department in 1981) and the breadth of the charges, it is difficult to recite the information contemplated by the Court's order of January 7, 1983 in a single affidavit, and confusing to submit (it) in multiple affidavits signed by the persons having knowledge of the various aspects of this longstanding problem of the Flint School District. Therefore, the following affidavit is divided into sections to provide some continuity with each affiant swearing to the truth of the factual statements of which he has knowledge.

AFFIDAVIT

A.

OCB-HEW Charges

1. In 1968-1970 the Office for Civil Rights, Department of Health, Education and Welfare (OCR-HEW) conducted an investigation of the Flint School District to determine if the District operated its federally funded programs in a discriminatory manner in violation of Title VI-*42 USC 2000d.*

2. On August 29, 1975 Kenneth A. Mines, Director of OCR, Region V, informed the District that it was deemed to be in violation of Titlte VI. Among other things

Mines charged the "District had pursued a policy of racially motivated employment and assignment of teachers and other professional staff" on the basis of race, that discriminatory assignment practices "effectively limited employment opportunities for black teachers by restricting the positions for which they were considered to those available at predominately black elementary schools", restricted and limited the opportunities of black teachers for promotion to administrative positions and regularly assigned less qualified teachers to predominantly black schools. Mines' letter of August 29, 1975 is attached as *Exhibit 1.*

3. On March 22, 1976 Martin H. Gerry, Acting Director Office for Civil Rights, Department of Health, Education and Welfare, notified the District as follows:

> "On August 29, 1975, Kenneth A. Mines, Director of our Regional Office, advised you that your District is not in compliance with Title VI of the Civil Rights Act of 1964 by virtue of your failure to provide equal educational services and opportunities to minority students, and by reason of the existence of racially motivated policies and practices with respect to the assignment of students and *the employment of faculty and other staff. . .*"

> "In addition, I am today notifying you that final approval of any application filed with this Department for Federal funds for new programs and activities is hereby ordered deferred. Your state education agency is also being notified that the commitments of Federal financial assistance for all new activities are likewise to be deferred. . ."

See *Exhibit 2* hereto attached.

4. On March 22, 1976 John W. Porter, Michigan Superintendent of Public Instruction, was notified by OCR-

HEW that federal assistance to the District had been ordered deferred—*Exhibit 3.*

5. On May 17, 1976 Robert Hornberger, Director of Department Services for Michigan's Department of Education, notified the District that federal assistance funneled through the State Department would be deferred—*Exhibit 4.*

6. On May 21, 1976 Lloyd R. Henderson, Director of Elementary and Secondary Education Division of OCR-HEW, advised the District that the Education/Desegregation Plan adopted by the Flint Board of Education on April 7, 1976 was unacceptable as a remedy to the non-compliance problems of the District under Title VI for numerous reasons set forth in full in the letter. Included among his requirements was faculty reassignment so that the racial composition of the teaching staff of each school was the same as the racial composition of the teaching staff of the District as a whole, (the so-called Singleton ratio)[1] and a method of monitoring faculty assignments to insure continued compliance with Singleton ratios. In addition Henderson said:

> "Therefore, the district's plan must make it clear that the process of assigning a specific number of teachers to individual schools will not limit the future employment opportunity of any applicant. The provision should clarify the distinction between the employment process and the process of assignment and eliminate misunderstandings that otherwise might arise. For example, the plan might contain a policy statement to the effect that the district, through its personnel

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1. Singleton v Jackson School District, 419 F2d 211 (Fifth Circuit 1967)

> procedures, will continue its attempt to increase the number of minority teachers and principals and that as the district-wide percentage of minority teachers changes, appropriate reassignments will be made."

Henderson's letter of May 21, 1976 is attached as *Exhibit 5.*

B.

Administrative Enforcement Proceedings

7. On March 24, 1976, following the deferral order issued by the Acting Director of OCR on March 22 (Exhibit 2); General Counsel for the Department of Health, Education and Welfare commenced compliance proceedings for the termination of federal financial assistance to the District by filing a "Notice of Opportunity for Hearing", including charges of violation of Title VI essentially the same as those contained in Mines' letter of August 29, 1975 (Exhibit 1). A copy of the Notice of Opportunity for Hearing is attached as *Exhibit 6.*

8. Following pre-trial conferences with Administrative Law Judge Mast assigned to conduct the proceedings and various motions, the matter came on for hearing in April of 1977. The Administrative Law Judge issued his decision October 6, 1977—*Exhibit 7.* Judge Mast found that the District subjected and continued to subject to discrimination, persons on the ground of race and color, within the meaning of the Act (Title VI) as amended by the following:

> "a. Respondent Flint historically engaged in conduct, continued after 1964 and continues at present to engage in conduct and vestiges of Respondent's pre-1964 conduct continued after 1964 and continues at present, to segregate black students into certain

schools and maintain other schools as white in enrollment as long as possible, which may be more fully described as follows:

(1) neighborhood school policies;

(2) school site selection;

(3) changes in school attendance zone boundaries; and

(4) adjustment of school assignments inconsistent with school capacities.

b. Respondent Flint historically operated, continued after 1964 and continues to operate a school system identified by substantial segregation of race and color of students assigned.

c. Respondent Flint historically assigned, and continued after 1964 until January, 1977, to assign Black teachers and supervisors to schools which were identified by predominant enrollment of Black students.

d. Respondent Flint historically operated, continued after 1964 until 1977 to operate a school system identified by substantial segregation by race and color of teachers and supervisors assigned." See pg. 115 of the Decision.

9. The Administrative Law Judge established a plan which he said would bring the District into compliance with the requirements of Title VI. After providing for pairing of schools to further integrate the student bodies he said on page 114 of the Decision:

"Although Respondent Flint achieved compliance with *Singleton* in 1977, the compliance is concluded to be as a result of this case. Accordingly, desegregation should require a commitment from Respondent Flint to maintain compliance with *Singleton* in the future.

Discrimination in employment of teachers has not been established. No remedy, thus, can be required on this allegation. As noted, since 1960 Respondent Flint ap-

pears to have engaged in an effective affirmative action plan in the employment of Black teachers. For the same reason, no remedy can be required for the alleged discrimination in promotions of blacks to supervisory teachers since 1964, and for the alleged discrimination in assignment of lower qualified teachers to predominantly Black schools."

10. The statistical data upon which the Administrative Law Judge relied in part in reaching his decision is recited in detail on pages 73 through 100 of the Decision, and the census figures for the years 1930 through 1970 may be found on page 37 of the Decision. The 1980 census for the City of Flint shows that the white population of the City was 89,647 or 56.2% of the total population. 66,124 or 41.4% of the City's residents were black. The remainder were other minorities.

In the same year (1980) 12,649 or 37.6% of the District's students were white, 19,902 or 59.2% were black. The remainder were Indian, Asian and Hispanic.

In 1980 1,278.8 teachers or 68.1% were white, 581.7 or 31% were black, 17 or .9% were other minorities.

In the current school year (1982-83) the District has 11,243 or 35.6% white students, 19,345 or 61.3% black students and the remainder are other minorities.

In the current school year 1,181.7 or 66.8% of the District's teachers are white and 565.5 or 32% are black. The remaining 22 or 1.2% of the staff are Indian, Asians or Spanish.

Charts showing the racial distribution of staff and students in the Flint School System in the years 1950 through 1975 are attached as Exhibits 8, 9 and 10.

C.

Teachers and Counselors

11. Counselors are teachers. They are members of the teacher collective bargaining unit (United Teachers of Flint). They are paid on the same salary scales and receive the same fringe benefits. Throughout the HEW enforcement proceedings no distinction was made between counselors and teachers and no special consideration was given to counselors.

12. The track record of the District was worse with respect to the hiring of minority counselors than minority teachers. The first black teacher was hired by the District in 1943. The first black counselor was hired by the District in 1963, 20 years later. In 1965-66 of 55 counselors 3 or 5.45% were black. In 1966 of 60 counselors 2 or 3.33% were black. In the last mentioned year of 816 teachers 89 or 11% were black. Similar comparisons can be made in other years with like result until approximate parity was reached.

It is true, as the Administrative Law Judge found, that the District adopted the Singleton ratio for assignment of teachers in an effort to satisfy the requirements of OCR-HEW, and the District in keeping with the findings of the Administrative Law Judge and its commitments to HEW and the Department of Justice has continued to utilize the Singleton ratio in the assignment of teachers (including counselors). In addition the District has attempted to maintain a counseling staff that, as a self-contained unit, approximates the Singleton ratio and permits the assignment of at least one black counselor to each school.

It appeared in 1976 or thereabouts that neither objective could be attained in times of staff reductions if seniority were the only criteria for retention of counselors. See, attached seniority list. Exhibit 11. To meet what they believed to be the needs of the students of the District and at the same time to effect substantial compliance with Singleton principles, the Board of Education and the United Teachers of Flint in 1979 negotiated the following provision which has remained a part of the Master Teacher Contract since that time:

Article XIV, I

"If layoffs are to occur, a seniority list in accordance with this paragraph shall be prepared by the Board and a copy thereof be given to the UTF.

It is understood that should the Board determine to reduce staff among positions requiring more than a work year of thirty-nine (39) weeks as determined by the teacher's individual contract of employment (e.g., academic counselors, librarians) said reduction will be made in accord with the provisions of Article XIV, F-1; -2; -3 (herein defined) for 40 week employees for purposes of lay-off from 40 week employment to 39 week employment is a plus five percent from the ratio of minority teachers to majority teachers in the secondary level teacher labor pool in existence at the time of lay-off); -5 and Provision G, subject to the following limitations:

A teacher assigned to one of the aforesaid positions and who is laid off from a 40-week position and transferred into a 39-week position under Provisions F and G of this Article shall be granted an extra week's work in some appropriate capacity for one (1) year subsequent to the layoff.

The above provision will not be used to circumvent seniority (e.g., laying off a more senior minority counselor to retain a less senior minority counselor).

> Additionally, if the area reduced is restaffed (moving toward the number the area was at before the decrease) district wide, the teacher(s) transferred out shall be guaranteed return to the area on the basis of seniority (last out, first back) for a period of three years."

See Master Teacher Contract for the period September 1, 1979-August 31, 1982 and September 1, 1982-August 31, 1985 submitted herewith.

D.

Deferral, Termination and Litigation

13. In September, 1976 the Board of Education brought a suit in this Court against HEW, the Secretary of the Department of Health, Education and Welfare, the Acting Director of the Office for Civil Rights and Administrative Law Judge, James L. Mast, seeking relief from continued deferral of federal assistance and other relief (Civil No. 76-40098). After a hearing the Court on September 30, 1976, the Honorable James Harvey presiding, issued an Opinion and Order dismissing the cause for want of jurisdiction.

After the decision of Administrative Law Judge Mast (Exhibit 7), the Office for Education, Department of Health, Education and Welfare, denied the School District's application for Emergency School Aid Act (ESAA) assistance because of Mast's decision to terminate federal funds for the District. The District facing the loss of several millions of dollars instituted action in this Court seeking injunctive and other relief (Civil Action No. 78-40111). A preliminary injunction was issued enjoining HEW and other government agencies from encumbering

or disposing of funds otherwise available for the District under ESAA.

During the same period of time the Office for Civil Rights referred the Flint case to the Justice Department. The Justice Department then instituted suit against the Board of Education in this Court (Civil Action No. 80-40075). A settlement was reached and pursuant to that settlement a Consent Judgment was issued. Thereafter appropriate orders were issued by OCR-HEW and the Justice Department setting aside deferral and termination orders and the District received that portion of ESAA funds allocated to it and has functioned under the Consent Judgment and the other findings of Administrative Law Judge James Mast since that time.

14. The last two mentioned actions did not involve the employment practices of the District with respect to its teachers inasmuch as that matter was resolved by the Judge Mast's findings that the District had engaged in affirmative action to increase the number of minority employees on staff and by reassigning pursuant to the Singleton ratio. However, the first mentioned suit in this Court did involve the employment practices of the District and the government continued to insist throughout the hearing before Administrative Law Judge Mast in 1977 that the District was guilty of employment practices constituting violations of Title VI of the Civil Rights Act of 1964.

Reference to the Court file is requested.

E.

Impact of Adverse Ruling

15. In the current school year (1982-83) the District employs 44 counselors of whom 15 or 34% are black. The

District has six middle schools (junior high schools), three combined middle and senior high schools and four high schools.[2] Black students attend each of the 13 middle and senior high schools, and a black counselor is assigned to each school.

Plaintiff and three other white counselors who have been transferred to the classroom have more seniority than the four black counselors having the least seniority. If the white counselors are returned to counseling positions the four black counselors will be reassigned to classroom positions leaving the District with 11 black counselors and 33 white counselors, a ratio of 25% black to 75% white, and the District will not be able to provide a black counselor for each of its middle and senior high schools.

16. Although counselors receive the same weekly salaries as teachers, under the Master Teacher Contracts applicable here counselors and certain other members of the bargaining unit represented by the United Teachers of Flint work 40 weeks per year instead of 39 weeks per year worked by classroom teachers. The contractual provisions recited above require the District to pay counselors and other members of the bargaining unit who work 40 weeks in a year for 40 weeks work in a year succeeding transfer to a 39 week position. Plaintiff was a counselor in the 1979-80 school year. Thus he worked 40 weeks in that year. The following year (1980-81) he was transferred to a classroom position as an English teacher. In that year he worked 39 weeks and was paid for 40 weeks. In

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2. Zimmerman Middle School will be closed in August, 1983 and thus is not considered in the count.

1981-82 plaintiff was again assigned to a counseling position from which he was transferred to a teaching position in the 1982-83 school year. Plaintiff worked 40 weeks in 1981-82 and he will be paid for 40 weeks in 1982-83 although he will work only 39 weeks. Thus at this point plaintiff has suffered no financial loss as a result of the transfers.

/s/ Stuart A. Boze
Executive Director of
Personnel Services

/s/ Roger K. Allen
Executive Director Labor Relations

/s/ Ledell Watson
Personnel Consultant Middle and
Senior High Schools

/s/ David Doherty
Director of Community Relations
and Grants

/s/ Robert L. Revis
Director of Research and Testing

STATE OF MICHIGAN)
) ss:
COUNTY OF GENESEE)

On this 11th day of March, 1983 before me, a notary public in and for Genesee County, Michigan, personally appeared, Stuart A. Boze, Roger K. Allen, Ledell Watson, David Doherty and Robert L. Revis, to me personally known, each of whom after being first duly sworn by me said:

1. He is employed by the School District of the City of Flint, Genesee County, Michigan;

2. He holds the position set forth above after his name;

3. He has knowledge of certain of the facts set forth in the foregoing Affidavit and can testify competently with respect thereto under oath if called upon to do so.

/s/ Nova J. Leonard
Notary Public,
Genesee County, Mich.
My Commission expires: 4-24-85

C. REES DEAN P12584
352 S. Saginaw St., Suite 510
Flint, MI 48502
(313) 767-1520

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action
No. 80-40349

STUART MARSH,

Plaintiff,

-vs-

BOARD OF EDUCATION OF CITY OF FLINT, et al,

Defendants.

_____/

BRUCE A. NEWMAN (P18268)
RICHARD J. DREW (P23729)
Attorneys for Plaintiff

_____/

THOMAS A. BAIRD (P29050)
Attorney for United Teachers of Flint

_____/

C. REES DEAN (P12584)
Attorney for Defendants, Board of Education and Macksood

_____/

AFFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Being duly sworn, now comes Plaintiff, STUART MARSH, and states as follows:

1. That on September 1st of 1980, the Affiant was fifty-six (56) years of age.

2. That Affiant has been assigned as a student counselor in the Flint school district since September of 1969.

3. That Affiant has earned his certification as a counselor from the State of Michigan by meeting academic requirements above and beyond that of a classroom teacher.

4. That on or about September 1st, 1980, Affiant was forced to suffer a material change in the conditions of his employment by virtue of his involuntary transfer back to the classroom.

5. That this abrupt change in the conditions of his employment represented a real demotion and a cause of great psychological stress to Affiant in the following particulars:

   (a) That he was transfered from one building to another and was forced to teach new subjects (e.g. English, Lab, Speech and History, which courses he had never taught before in his entire teaching career).

   (b) That he was required to teach a Civics course which he had not taught in over twenty years.

   (c) That Affiant has prepared and geared himself for a career in student counseling by obtaining a complete knowledge of the various types of counseling techniques and remaining current on information regarding financial aides, College Admissions, job opportunities,

etc., as well continuing professional reading and study in the area of counseling on a regular basis.

(d) That the constant change in subject matter resulted in substantial extra preparation when at the same time that Affiant had geared himself for the work of counseling.

(e) That Affiant did not have adequate resource background materials for the teaching of his new subject matter.

(f) That Affiant was assigned a variety of courses for which he was not properly prepared (e.g. Speech, English Lab, Reading, English, College Preparatory English, History of the United States, Civil War to Present, Civics and History—American Frontier).

(g) That Affiant had to undergo a major change of established work habits.

6. That on information of belief, Affiant believes that there is substantial damage to the educational process by virtue of the failure of the school board to utilize the Affiant's considerable expertise and experience in counseling and requiring him to teach subjects for which he is ill-prepared.

7. That there was additional damage to the educational process by virtue of utilizing less experienced counselors in place of Affiant.

8. That Affiant was forced to change buildings, from Bryant to Southwestern to Whittier within the Flint Public School System.

9. That seniority is essentially a racially neutral criteria for educational placement.

10. That based upon experience of Affiant, if a role model is necessary for minority students the same would best be utilized in the position of classroom teacher where the exposure to students is substantially more extensive than that as a counselor.

11. That Affiant has never been found wanting in his evaluations as a counselor and, in fact, has received the highest possible performance evaluations—even by minority principals who certainly are in a position to judge his ability to relate to minority students and to observe his interaction with minority students.

12. That Affiant has prepared himself by virtue of academic training and experience and extra-curricular activities to serve as a student counselor and that by virtue of the collective bargaining agreement between the Flint School Board and the Flint Teachers Union, he has been forced to suffer deprivation of that position.

13. That the Affiant, due to his age and the decline of student enrollment and consequent decline in number of counseling positions, is being forced to suffer permanent material change in his conditions of employment and in all probability will never be able to return to the position of counselor during his lifetime while others with less seniority will be allowed to remain in the protected counselor position.

14. That Affiant not only voted against the adoption of the collective bargaining agreement in question, but he was, in fact, ruled out of order by an official of the Defendant Union when he spoke against the agreement, since counselors were singled out for adverse treatment under the Affirmative Action program.

Further, Affiant sayeth not.

Dated: 4/14/83

/s/ Stuart Marsh, Plaintiff

Prepared by:

Bruce A. Newman, P.C. (P18268)
Attorney at Law
444 Church Street
Flint, Michigan 48502
Phone: (313) 232-4186

Subscribed and sworn to before
me this 15th day of April, 1983.

/s/ Linda G. Barnes
Notary Public, Genesee County, Michigan
My Commission Expires: 8/6/85

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sixth Circuit Court of Appeals
Case No. 84-1240

U.S. District Court Case
No. 80 40349 (ED Mich)

STUART MARSH,

Plaintiff-Appellant,

-vs-

BOARD OF EDUCATION OF CITY
OF FLINT, et al,

Defendants-Appellees.

Clint Bolick
K. Preston Oade, Jr.
Maxwell A. Miller
Attorneys for Plaintiff-Appellant

C. Rees Dean (P12584)
Attorney for Defendants-Appellees
Board and Leo Macksood

Thomas A. Baird (P29050)
Attorney for Defendants-Appellees
United Teachers, Harold Keim and
Lane Hotchkiss

_____/

AFFIDAVIT IN SUPPORT OF DEFENDANTS-APPELLEES (BOARD OF EDUCATION) MOTION TO DISMISS

STATE OF MICHIGAN)
) ss:
COUNTY OF GENESEE)

STUART A. BOZE, being first duly sworn, says:

1. He is the Executive Director, Personnel Services for Defendant-Appellee Board of Education of the School District of the City of Flint (Board).

2. He has knowledge of the facts herein and, if sworn, can testify competently with regard thereto.

3. Stuart A. Marsh is a teacher in the School District of the City of Flint (District). He has been employed by the Board continuously since September 7, 1965. He has accrued seniority in the teacher bargaining unit since the date of his employment.[1] Since September, 1967, Mr. Marsh's employment has been governed by individual contracts and by collective bargaining agreements between the Board and Defendant-Appellee, United Teachers of Flint (UTF), the collective bargaining agent for Flint teachers.

4. On September 7, 1965 Mr. Marsh was assigned to Northwestern High School as a teacher of English. He continued to teach English, Homeroom or Foreign Relations until September, 1970.

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1. Seniority is systemwide seniority. Seniority accrues from the date of employment. Seniority does not accrue during unpaid leaves of absence. Mr. Marsh is charged with no unpaid leaves of absence. Therefore his seniority has accrued from the date of his employment.

5. In September, 1970 Mr. Marsh was assigned to a student counselor position. Student counselors are employed only in the secondary schools. He continued as a student counselor until the beginning of the 1980-81 academic school year.

6. In September, 1980 the Board reduced the number of student counselors from 52 to 48. Acting under affirmative action provisions of Article XIV of the collective bargaining agreement entitled "Vacancies, Transfers and Reduction in Staff", the Board transferred Mr. Marsh to a teaching position (English) at a secondary school.

7. The pertinent paragraphs of Article XIV are paragraphs F, G, H and I. The full text of these paragraphs is attached. Paragraph I permits the Board to ignore systemwide seniority in determining which counselors shall be laid off or transferred and consider only the District's over all instructional needs, teacher certification and qualifications and affirmative action goals.

The goal was a counseling staff includng a percentage of minorities that exeeceded by 5% the percentage of minority teachers to the total teaching staff (including counselors) in the secondary level teacher labor pool in existence at the time of layoff.

Affirmative action provisions did not, however, apply to filling of vacancies on the counseling staff. In the event of a vacancy or an increase in the number of counselor positions, laid off or transferred counselors are guaranteed the right to return to counseling on the basis of seniority (last out first back) for a period of three years.

8. In the 1981-82 school year Mr. Marsh exercised his senority rights to claim a counselor's position.

9. In the 1982-83 academic year he was again transferred to a teaching position. He remained in a teaching position during the 1983-84 academic school year.

10. Two counselors retired at the close of the 1983-84 academic school year, and on August 27, 1984 at the opening of the 1984-85 school year Mr. Marsh was reassigned to a counseling position.

11. The number of counselors employed by the School District is dictated by accreditation requirements of the North Central Accrediting Agency. A counselor may be assigned no more than 350 students.

12. The Board will employ 43 counselors in the 1984-85 academic school year. Affirmative action goals have been met. Each counselor's complement of students is at or near the allowed maximum (350).

13. Of the 43 counselors, the counselor having the most credited systemwide seniority was employed September 7, 1954, and the counselor having the least credited systemwide seniority was employed September 18, 1967. No persons, other than those already on the Board's payroll, have been employed as counselors since September 18, 1967. Her credited seniority dates from February 3, 1971.

13. Of the white counselors employed in the District in the 1984-85 school year, Mr. Marsh has the least credited seniority. Seven black counselors have less credited seniority than Mr. Marsh.

Given the age of the counseling staff[2] and thus the potential for a greater number of vacancies in the next few years; the fact that each counselor's student load is at or near the allowable maximum; and the increased number of students at the secondary level resulting from the addition of the ninth grade to the District's high schools accompanied by the adoption of a middle school plan, it is highly improbable that Mr. Marsh will be reassigned to a classroom teaching position during the remainder of his teaching career.

The current collective bargaining agreement expires Augsut 31, 1985. Whether the provisions of Article XIV challenged by Mr. Marsh in this action will be included in the next collective bargaining agreement has not yet been determined.

/s/ Stuart A. Boze

Subscribed and sworn to before me this
29th day of August, 1984.

/s/ Diane Johnson
Notary Public, Genessee County, Michigan
My Commission expires: 1-5-87

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2. Three counselors are 63 years of age; four are between 60 and 63; seven are between 55 and 60.